

# FREDERICK COUNTY ETHICS COMMISSION

## FREDERICK COUNTY, MARYLAND

### OFFICE OF THE COUNTY ATTORNEY

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### FREDERICK COUNTY ETHICS COMMISSION

#### ADVISORY OPINION 10-02

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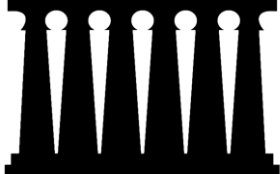
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The Ethics Commission recently received a request for an Advisory Opinion from a County Commissioner-Elect who operates a construction business in Frederick County. According to the Financial Disclosure Statement that the Commissioner-Elect submitted when he filed for office, he is the majority owner of this corporation and serves as the corporation's President. The corporation currently has a contract with Frederick County. In addition, the corporation is also a subcontractor on developer-funded contracts in the County. Noting the potential for conflict of interest concerns under the County's Ethics Ordinance, the Commissioner-Elect requested guidance from the Ethics Commission as to how he should proceed in these matters during his term as a County Commissioner.

It is the Ethics Commission's understanding that the contract between the County and the Commissioner-Elect's corporation is on-going, although it is anticipated that work will be completed shortly. The contract, which has a value of over \$100,000, was awarded to the corporation after completion of a competitive bidding process prior to this month's election. In his request for an advisory opinion, the Commissioner-Elect has expressed an interest in continuing to bid on County CIP projects during his tenure and has advised the Ethics Commission that if he did bid on County contracts he would abstain from voting on those bid awards and have no involvement as a Commissioner in the bid-award process.

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As noted above, the corporation is also a subcontractor on developer-funded water/sewer contracts. Although the corporation is not a party to the contract between the County and the developer, County inspectors inspect the corporation's work to ensure that the work has been completed in a manner satisfactory to the County.<sup>1</sup> Any change orders to these contracts must be approved by the County and the County's dispute resolution process applies when disputes arise under the contract. Under the dispute resolution process, a County Division Director is appointed to hold a hearing and resolve the dispute. The appointment of the Division Director is made by the County Manager. Both the County Manager and the Division Director are at-will employees who serve at the pleasure of the Board of County Commissioners.

### **The Ethics Ordinance**

The following Statement of Purpose, which is contained in the Ethics Ordinance, describes the vital role that the Ordinance plays in the functioning of the County government:

The Board of County Commissioners, recognizing that our system of representative government is dependent in part upon the people maintaining the highest trust in their public officials and employees, finds and declares that the people have a right to be assured that the impartiality and independent judgment of public officials and employees will be maintained. It is evident that this confidence and trust is eroded when the conduct of the county's business is subject to improper influence and even the appearance of improper influence. For the purpose of guarding against improper influence, the Board of County Commissioners enacts this law to set minimum standards for their conduct of county business.

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<sup>1</sup> Developer-funded contracts were discussed in Ethics Opinion 96-1. As noted in that Opinion, the County reviews developer-funded contracts to ensure that the developer complies with the applicable laws and that these projects are designed according to the highest engineering standards so that the developer fully pays for these projects while they are under development rather than leaving the government responsible for the costs of unnecessary repairs after the development is finished.

The following conflict of interest provisions in the Ethics Ordinance are relevant here:

§ 1-7.1-4. CONFLICTS OF INTEREST.

All Frederick County officials and employees shall not:

- (A) Act on behalf of the county in any matter which would, to their knowledge, have a direct financial impact, as distinguished from the public generally, on them, their spouse, parent, parent-in-law, child, brother, sister, or a business entity with which any of the aforesaid are affiliated. (If a disqualification pursuant to this subsection leaves any body with less than a quorum capable of acting, or if the disqualified official or employee is required by law to act or is the only person authorized to act, the disqualified person shall disclose the nature and circumstances of the conflict publicly, and then to the Commission as soon as practical, and may participate or act.)
  - (B) Hold or acquire an interest in a business entity that has or is negotiating a contract of \$1,000 or more with the county or is regulated by their agency, except as exempted by the Commission pursuant to § 1-7.1-7 of this chapter;
  - (C) Be employed by a business entity that has or is negotiating a contract of more than \$1,000 with the county or is regulated by their agency, except as exempted by the Commission pursuant to § 1-7.1-7 of this chapter;
  - (D) Hold any outside employment relationship that would impair their impartiality or independence of judgment;<sup>2</sup>
- \* \* \*
- (H) Intentionally use the prestige of their office or privileged information acquired in their official county position for their own private gain or that of another. The performance of usual and customary constituent services, without additional compensation, does not constitute the use of the prestige of office for an official's or employee's private gain or that of another.

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<sup>2</sup> The State Ethics Commission has found that the comparable provision in the State Ethics Law applies where there are no contractual relationships, but where the relationship between official duties and outside activities gives rise to clear and serious concerns as to the ability of the official or employee to engage in the outside activity and still maintain his impartiality and independence of judgment in carrying out his State duties. (Opinion No. 86-14)

Should one or more of these conflict of interest sections apply, Section 1-7.1-7 of the Ethics Ordinance authorizes the Ethics Commission to grant exemptions and modifications to these provisions. In order to grant an exemption or modification, the Ethics Commission must first find that application of the conflict of interest provisions would meet one of the following tests:

- (A) Constitute an unreasonable invasion of privacy;
- (B) Significantly reduce the availability of qualified persons for public service; or
- (C) Not be required to preserve the purposes of [the Ethics Ordinance].

**Prior Decisions of the County Ethics Commission  
and the State Ethics Commission**

Before reaching a decision in this matter, the Ethics Commission looked to prior published opinions of the Ethics Commission, as well as opinions issued by the State Ethics Commission, for guidance.

In Ethics Opinion 94-3, the County Ethics Commission dealt with a potential conflict of interest faced by an in-coming County Commissioner. In that case, the Commissioner-Elect owned a 9% interest in a County firm that had a contract with the County for stormwater work. The Commissioner-Elect was also an employee of the firm. Prior to taking office, approximately two-thirds of the work under the contract had already been billed. The Ethics Commission was further advised that the firm did not anticipate any other contracts with the Frederick County government and that the Commissioner-Elect would have no personal involvement with the remainder of the contract. The Ethics Commission concluded that there was no conflict of interest in awarding the contract and in the first two-thirds of the operation of the contract

because those events occurred months before the election. If the Commissioner-Elect took office without having first obtained an exemption from the Ethics Commission for the remainder of the contract, however, the Commission found that the Commissioner-Elect would be in violation of the Ethics Ordinance.

The Ethics Commission then granted the Commissioner-Elect an exemption from the provisions of Section 1-7.1-4(B) and (C), finding that under the facts presented application of those provisions would not be required to preserve the purposes of the Ethics Ordinance. Nevertheless, the Ethics Commission directed that as a Commissioner the Commissioner-Elect should disqualify himself entirely from the remainder of the contract should any issue, problem or dispute arise concerning the contract between the County and the firm. The Ethics Commission also concurred with the firm's position that no further contracts with the County government would be pursued during the Commissioner's tenure in office.

Under Section 1-7.1-4(B), it is a conflict of interest for an official to have an interest in a business that is "regulated by" his agency. Similarly, under Section 1-7.1-4(C), it is a conflict of interest for an official to be employed by an entity that is "regulated by" his agency. The Ethics Commission previously construed this term in Ethics Opinion 99-4, concluding that "the regulation of an entity by a county agency constitutes regulation by the Board of County Commissioners." The Opinion notes that under State law, the Board of County Commissioners has the power to hire and fire officers and employees, the power to enforce certain code provisions, and the power to assign functions to County offices and departments. Because of those powers, the following was found to be true:

[T]he many agencies and departments of the County are representatives of the Board of County Commissioners. There is no separation between the Board of County Commissioners and the various agencies and departments. Any county regulation enforced by an agency is done on behalf of the Board of County Commissioners.

Turning to guidance provided by the State Ethics Commission, there have been a number of opinions addressing the potential for conflicts of interest arising out of the desire on the part of government officials and employees to engage in outside employment activities that have some connection to their government positions. Only two of those opinions will be discussed here. In State Ethics Commission Opinion 04-01, the Chair of the State Information Technology Board asked whether he could remain on that Board if an information technology corporation he established was a subcontractor on a recently awarded information technology contract. The State Ethics Commission concluded that the Chair could not continue to serve on the Board if his corporation became a subcontractor on the State contract, denying the Chair's request for an exemption from the application of the State Ethics Law. Under the State Ethics Law, State officials and employees are precluded from having a financial interest in or being employed by an entity that has a contract with that governmental unit or an entity that is a subcontractor on a contract with that governmental unit.<sup>3</sup>

In State Ethics Opinion 82-3, the State Ethics Commission considered a request from a construction manager employed by the St. Mary's City Commission who wanted to bid, most likely as a subcontractor, on work related to a proposed project. The employee was the Farm Supervisor for the 17<sup>th</sup> Century Plantation. The proposed

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<sup>3</sup> The County's Ethics Ordinance does not specifically address subcontracts in its conflict of interest provisions.

project was for a 17<sup>th</sup> Century Inn. At the time of the request, the employee had not been involved in the Inn project. Nevertheless, the State Ethics Commission found that the employee could not bid on the project while employed by the St. Mary's Commission, precluding the employee from having any contact with his agency about his private interest on working on the Inn project while still employed by that agency.

### **Findings and Recommendations**

It is the role of the Ethics Commission under Section 1-7.1-3(B)(2) to provide advice to officials and employees on how to comply with the requirements of the Ethics Ordinance. By following the dictates of the Ethics Ordinance, officials and employees will avoid situations that could damage the public's trust in the integrity of the County government.

The business dealings that the Commissioner-Elect's corporation has with the County government, both as a contractor and as a subcontractor, would create a conflict of interest for the Commissioner-Elect under the County's Ethics Ordinance once the Commissioner-Elect takes office, unless the Ethics Commission grants him an exemption from those provisions. The Ethics Ordinance is clear and unambiguous on this point. Should the Commissioner-Elect's corporation seek to enter into contracts with the County or act as a subcontractor on developer-funded agreements once the Commissioner-Elect is a County Commissioner, those actions would violate the Ethics Ordinance's conflict of interest provisions as well as create the appearance of impropriety.

The Ethics Commission has considered the standards set forth in Section 1-7.1-7 for exemptions from the conflict of interest provisions and has concluded that a blanket exemption is not justified, as applying the Ethics Ordinance to the Commissioner-Elect once he takes office would not constitute an unreasonable invasion of privacy or significantly reduce the availability of qualified persons for public service. Further, the Ethics Commission cannot find that an exemption is required to preserve the purposes of the Ethics Ordinance.

As noted, the Commissioner-Elect's corporation currently has a contract with the County and is a subcontractor on developer-funded agreements. Because those contractual arrangements were made before the Commissioner-Elect's election, the Ethics Commission will not require the Commissioner-Elect's corporation to breach those agreements when the Commissioner-Elect takes office. Work on those contracts may be completed, but the Commissioner-Elect must recuse himself as a County Commissioner from participation in all discussions and votes related to those contracts.

In order to provide additional guidance for the Commissioner-Elect as to how he can best comply with the Ethics Ordinance after he takes office, the Ethics Commission wants to express concern about the possibility of his corporation continuing to do work in Frederick County for private individuals or entities when that work would be subject to inspection and approval by County officials or employees charged with the responsibility for enforcing the law and regulations. County Commissioners exercise authority and influence both directly and indirectly over County operations and employees. This can occur even when the Commissioner does



not intend to exert influence as there may be a perception by an employee that he should not make a decision contrary to the Commissioner's economic interests. There is also the danger that the public may perceive an improper influence due to the fact that the employee determining whether the work has been performed properly is a County employee who is ultimately answerable to the Commissioner for the decisions he makes.

To have County officials and employees placed in a position where they must determine whether the work of the Commissioner-Elect's corporation should be approved places those officials and employees in a potentially difficult situation and can call into question by the public and others the objectivity of the decisions they make on the County's behalf. To avoid this, the Ethics Commission recommends that during the Commissioner-Elect's tenure as a County Commissioner his corporation refrain from taking on work in Frederick County when that work will be subject to inspection and approval by County employees or officials. By so doing, the Commissioner-Elect can avoid conflicts of interest and the appearance of impropriety.

Finally, the Ethics Commission wishes to call to the Commissioner-Elect's attention Ethics Opinion 99-4. In that Opinion, the Ethics Commission provided guidance to a County Commissioner on whether his representation of a plumbing and heating company in matters unrelated to County business would preclude the Commissioner from participating in discussions of and votes on proposed amendments to the plumbing code. The Ethics Commission found that if the Commissioner acted on behalf of the County in any matter that would, to his knowledge, have a direct impact on his client, as distinguished from the public generally, the Commissioner

would be in violation of the Ethics Ordinance. If, for example, an amendment to the plumbing code would make the client's license more valuable, the Ethics Commission concluded that any action taken by the Commissioner would be considered a conflict of interest under Section 1-7.1-4(A) of the Ethics Ordinance. As that Opinion is equally applicable to matters relating to a corporation with which a Commissioner is affiliated, the Ethics Commission recommends that the Commissioner-Elect exercise caution if matters affecting his corporation's financial interests come before the Board of County Commissioners. If such a situation arises, the Commissioner-Elect may wish to recuse himself from those discussions and votes or consider obtaining an Advisory Opinion from the Ethics Commission for additional guidance.

The Ethics Commission thanks the Commissioner-Elect for requesting an Advisory Opinion on how to remain in compliance with the Ethics Ordinance once he takes office.

November 29, 2010  
Date

/s/  
Andrew T. Jones, Chairman

/s/  
Karl W. Bickel, Member

/s/  
Paula C. Bell, Member

/s/  
E. Donald Foster, Alternate Member